

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

WILLIAM PENA	§	
v.	§	CIVIL ACTION NO. 6:05cv236
DAVID McDOWELL, ET AL.	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION  
OF THE UNITED STATES MAGISTRATE JUDGE  
AND ENTERING FINAL JUDGMENT

The Plaintiff William Pena, proceeding *pro se*, has filed a notice of removal seeking to remove a civil lawsuit which he filed in state court, to this Court. The Court ordered that the matter be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Pena stated that he filed his lawsuit in state court but it was dismissed as frivolous, when in fact it was never adjudicated on the merits. He appealed to the state court of appeals but the dismissal was affirmed, although modified to specify that the dismissal was to be without prejudice. He refiled his lawsuit, but it was dismissed again; when he appealed again, the dismissal was affirmed. Pena says that he has filed two motions for rehearing, but the first was denied and the second has received no ruling. He then filed a petition to remove the lawsuit to federal court.

On August 22, 2005, the Magistrate Judge entered a Report recommending that the petition for removal be denied. The Magistrate Judge observed that Pena's petition suffered from the fatal flaw that he, Pena, was the plaintiff in state court, and removal of lawsuits is a privilege reserved for defendants. 28 U.S.C. §1441, 1446. The Magistrate Judge thus recommended that the petition be denied and that this civil action be dismissed with prejudice.

Pena filed objections to this Report on September 6, 2005. In his objections, Pena argues that his lawsuit does state a claim, if heard on the merits, and that he did state a claim for relief in his lawsuit. He appears to believe that dismissal of this civil action is tantamount to the dismissal of his underlying lawsuit, on the merits, and asks that the Court either dismiss the case without prejudice or remand the lawsuit to the state court.

Pena's objections are without merit because the dismissal of the removal petition is not an adjudication on the merits of the claims on his lawsuit; it is simply a recognition that he cannot remove his own lawsuit to federal court. While remand to state court is normally proper, in this case there is nothing to remand because as Pena concedes, his state court lawsuit has been dismissed with prejudice and the dismissal was affirmed.

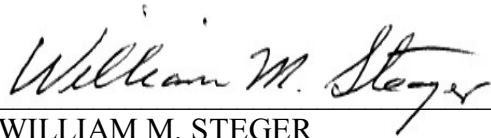
The Court has conducted a careful *de novo* review of the pleadings and other evidence in the cause, the Report of the Magistrate Judge, the Plaintiff's objections thereto, and all other documents and filings in the record. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the Plaintiff's objections are without merit. It is accordingly

ORDERED that the Plaintiff's objections are overruled and the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled civil action, consisting of a petition for removal, be and hereby is DISMISSED with prejudice for lack of subject matter jurisdiction. The Court makes clear that the dismissal of the removal petition is not an adjudication on the merits of Pena's lawsuit, about which merits the Court offers no opinion. To the extent that any portion of Pena's lawsuit remains active in state court, including any appeals or motions for rehearing which may be pending, that portion shall be returned to the state court's jurisdiction for such action as that court may deem proper. Finally, it is

ORDERED that any and all motions which may be pending in this civil action are hereby  
DENIED.

**SIGNED this 13th day of September, 2005.**

  
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WILLIAM M. STEGER  
UNITED STATES DISTRICT JUDGE